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No. 91-23

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOELLYN GRAY, *et al.*,

Petitioners,

—v.—

THE TOWN OF DARIEN, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED

Does a municipality deny its citizens equal protection of the laws in violation of the Fourteenth Amendment when it gives its citizens a right to veto, by simple majority vote at a special referendum, resolutions of the municipality's elected officials, but requires that such a veto be supported by at least one-fourth of the town's registered voters?

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PRELIMINARY STATEMENT

The Petition provides no basis for review by this Court. The ruling below is not in conflict with any ruling from this or any other federal court. No novel or unresolved question is presented. Indeed, all four federal judges who have reviewed this matter have concluded that one of this Court's prior cases compels judgment for respondents; yet petitioners expressly disavow any desire for this Court to overturn or revisit that case. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

The District Court granted respondents' motion for summary judgment dismissing the complaint after the close of discovery, and the Court of Appeals unanimously affirmed. Both courts rejected petitioners' claim that a municipal ordinance granting citizens a right to veto actions of the town's legislature violated the Equal Protection Clause. Both courts concluded that the ordinance is facially neutral and has no predictable impact upon any identifiable, fixed group. The petitioners thus failed to establish the elementary precondition of an Equal Protection claim: state action that treats similarly situated persons differently. The ordinance does not deny any person any fundamental right (or any right whatever) and serves important, legitimate state interests.

A. Darien's Town Government.

The Charter of Darien, Connecticut delegates the Town's legislative power to a Representative Town Meeting ("RTM"),[1] which the Charter provides shall have one member for every 100 registered voters, but in no event more than 100 members. The RTM currently has one member for every 103 registered voters.[2] RTM members serve for only two years; half the members stand for reelection each year. They do not run as members of political parties and, if elected, may not hold any other Town office. All members serve without compensation.[3]

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1 Under Connecticut law, municipal corporations may choose to conduct town business in a traditional town meeting, where all adult residents physically gather and vote on propositions, or by a Representative Town Meeting, in which the legislative power of the town is delegated to elected officials. Conn. Gen. Stat. § 7-193.

2 By comparison, the Connecticut House of Representatives has one member for every 11,079 registered voters and the Connecticut delegation to the U.S. House of Representatives has one member for every 278,824 registered voters.

3 Charter of Town of Darien §§ 48, 49, 50, 51, 52, 53.

The RTM acts by simple majority vote, provided however that a quorum is present consisting of a majority of all members. Thus, no measure can pass the RTM without the affirmative vote of more than 25% of its members.[4]

In addition, the Town's voters elect a five-member Board of Selectmen, which administers all Town agencies and constitutes the Town's executive branch, and a seven-member Board of Finance, which must approve all expenditures of Town funds. Members of the Board of Selectmen serve two-year terms; Finance Board members serve four-year terms, with half the Board standing for election every two years. Under the Town Charter and Connecticut law, no political party can ever have more than a bare majority of the membership of the Board of Selectmen or more than five of the seven seats on the Board of Finance. All members of the Board of Selectmen except the First Selectman receive only nominal compensation of $1,000. Finance Board members serve without compensation. Both Boards have quorum requirements similar to those for the RTM.[5]

Interest in local elections is keen. In November 1989, 65% of the Town's registered voters turned out to elect the Board of Selectmen, half the Board of Finance, and half the RTM. Competition for these positions is intense. None of the Selectmen who held office in March 1989 when this action was commenced remains on the Board today. In the last four elections for First Selectman, each major party has won twice.

B. The Town Action At Issue.

In 1988, two Darien families, the Prindles and the Hopkins, offered to sell the Town their adjoining homes and property, which together constituted a 2.29-acre parcel adjacent to the Town's central shopping district and commuter railroad station. Town officials expressed interest because the Town had for many years been formally studying the devel-

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4 *Id.* § 56.

5 *Id.* §§ 4, 10, 13, 14, 15, 20, 22; Conn. Gen. Stat. § 9-167a.

opment of moderately priced rental housing for Town employees and the Town's elderly population.

The Boards of Finance and Selectmen each unanimously approved a $2 million bond issue to purchase the property, and the Town's Planning and Zoning Commission unanimously approved the land acquisition. The RTM then voted on December 12, 1988 to issue the bonds and buy the land. The RTM vote was 73 to 13 (thus, 73% of all RTM members and 85% of those voting voted in favor of the purchase). Each of the four bodies voted at a separate public meeting. Articles announcing and reporting on these public meetings appeared in the local weekly and daily newspapers. The RTM vote followed formal debate at which all registered voters could speak concerning the proposal. The lead petitioner in this action, although not an RTM member, spoke at the public meeting before the vote.

C. The Veto Referendum.

Following the RTM vote, 666 registered voters (6% of the total) petitioned for a referendum on the bond issue pursuant to Section 58 of the Town Charter, which, as a further check on government power, gives a veto to any simple majority constituting at least 25% of the Town's registered voters. Section 58 may be invoked to veto any ordinance on any subject, or any appropriation of more than $50,000. All adult residents are eligible to register to vote in the veto referendum; all voters receive one vote; all votes are counted equally; the votes are tallied on a townwide basis.[6]

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6 Section 58 provides in relevant part as follows:

(a) Any action of the town meeting . . . shall be subject to overrule as follows: If a petition . . . signed by . . . not less than five percent of the electors . . . is filed . . . requesting that the action be referred to a vote of all the electors of the town, the board of selectmen shall promptly call a *special electors' meeting* to be held as soon as practicable thereafter, for the purpose of voting approval or disapproval of such action.

(footnote continued on next page)

Charter Section 58(e) was adopted as part of the original Town Charter in 1951 and has not been amended since.[7] In the words of the District Court, it "is content neutral, directed blindly at those who oppose any resolution adopted by the Town's duly-elected representatives." There is no evidence and indeed no allegation that in adopting Section 58, along with the rest of the Charter 40 years ago, the Town's voters intended to discriminate against any identifiable class or to insulate the Town's elected officials from the popular will. Indeed, on its face Section 58 is clearly intended to, and in practice it does, provide a substantial check on the legislature's power to act contrary to the electorate's consensus. Neither the State of Connecticut nor the United States grants its citizens any similar power to implement widespread dissatisfaction with legislative enactments.

Because the Charter requires the special electors' meeting to be held "as soon as practicable" after the petition is submitted, a referendum was scheduled for February 7, 1989, 30 days after the Board of Selectmen noticed it and 57 days after the RTM vote.[8] No candidate for office or other ques-

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(e) Any action so submitted to a *special electors' meeting* shall stand approved unless a majority of those voting thereon shall have voted "No" and such majority shall exceed in number twenty-five percent of all the electors of the town as of the last annual municipal election.

(Emphasis added.)

7 In 1975, after a public hearing, the RTM debated various proposals to reduce or eliminate the minimum participation requirement of § 58(e). Formal resolutions to reduce the threshold percentage to 20% and to 15% were defeated, as was one to eliminate the requirement entirely and permit a bare majority of any number of voters to veto an RTM action.

8 Section 58, a veto provision, is materially different in this respect from traditional referenda statutes, the overwhelming majority of which ensure substantial voter turnout by requiring that the question

tion was on the ballot.[9] The election was announced in local newspapers. Opponents of the RTM action published advertisements urging "No" votes.

The polls were open from noon until 8:00 p.m. in conformity with Connecticut Gen. Stat. § 7-9b (when a "municipality conducts a referendum on a day other than a state or local election, the polls shall be open between noon and eight p.m."). This was two hours longer than the time required for a special electors' meeting under Charter Section 58 itself, which provides that for a veto referendum the polls need be open only from 2:00 p.m. until 8:00 p.m.

All voters used the same central, convenient location, the Town Hall, where two of the Town's six districts vote in general elections. (The Town is only 14.9 square miles.) This conformed with the Connecticut Secretary of State's 1988 Advisory Guidelines Concerning Municipal Referendum Not Held In Conjunction With A Regular Or Special Election, which provide that "municipalities may choose to use fewer polling places than normally used in a regular election," and notes that "nothing in the general statutes . . . mandates the use of the same polling places" as in elections. Notices were posted in the other four locations sometimes used as polling places advising voters to go to Town Hall. Twelve voting machines were used, the same number used in recent general elections. Absentee ballots were available.

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be posed, not at a special election held on just a few days' notice, but at a regularly scheduled election no fewer than a fixed number of months hence. *E.g.* Alaska Const. art. 11, § 5; Cal. Const. art. II, § 9; Me. Const. art. 4, pt. 3, § 17; Mass. Const. art. 48, pt. 3, § 3; Neb. Const. art. III, § 3; Ohio Const. art. II, § 1c; Wyo. Const. art. 3, § 52.

9 The question posed in the referendum was the following:

"Shall the following action of a town meeting held on December 12, 1988 be approved: Resolution approving an appropriation and bond authorization of $2,000,000 for the purchase of the Prindle-Hopkins property on the northeast corner of Leroy Avenue and Squad Lane to be used for moderate rental housing?"

The decisions concerning voting hours and numbers of polling places were not made by anyone involved in the Town's decision to buy the Prindle-Hopkins property. The decisions were made by the Town Clerk and the registrars of voters for both major parties, none of whom serves on the RTM, the Board of Selectmen, or the Board of Finance. The undisputed evidence established that their decision was not based on any interest in the outcome of the referendum, but rather on consideration of the number of people likely to want to vote in such a special election and the facilities needed to accommodate them, and the extra costs associated with multiple polling places.

On the day of the veto referendum, 3,842 residents voted. While this 37% voter turnout was below the 89% participation in the 1988 presidential election, it was virtually indistinguishable from the percentage turnout in the last veto referendum under Section 58, held in 1972, even though in that referendum six polling places were open from 6:00 a.m. until 8:00 p.m. Both courts below found no evidence that any citizen eligible and wanting to vote against the RTM action was unable to do so because of the voting hours, the number of polling places, or for any other reason.

While the number of persons voting to veto the RTM's action constituted a majority of those casting ballots, they did not constitute even one quarter of all registered voters. The attempted veto therefore failed, and the RTM action stood. This result was also indistinguishable from the last veto referendum in 1972, when more polling places and longer hours were employed. Then, the "No's" also constituted a majority of those voting, but fewer than 25% of the registered voters.

D. Proceedings In The Courts Below.

Eleven Town residents, all of whom did vote in the referendum, filed suit in the United States District Court for the District of Connecticut on March 16, 1989, against the Town and over 112 of its elected officials. Petitioners alleged that

Charter Section 58 violated the one person/one vote principle, and was contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and that the individual respondents conspired to deny petitioners their constitutional rights, in violation of 42 U.S.C. §§ 1983 and 1985. Petitioners sought preliminary and permanent injunctive and declaratory relief (a) declaring Charter Section 58(e) unconstitutional, (b) declaring the "No's" the winners of the referendum, and (c) enjoining the Town and its officials from proceeding with the bond issue. Petitioners also sought damages of $2 million against the Selectmen and the Town's attorney.

Petitioners sought a temporary restraining order and a preliminary injunction at the outset of the case enjoining the Town from issuing the bonds or buying the property. After a full evidentiary hearing at which petitioners presented testimony from several witnesses, the District Court denied the motion on April 6, 1989, finding no probability of success on the merits or even sufficiently serious questions to make fair ground for litigation.[10] Petitioners did not appeal the denial of the preliminary injunction, seek an injunction from the Court of Appeals, or seek an expedited trial. The Town accordingly issued the debt and closed the acquisition, taking title to the property on May 24, 1989.

The District Court ordered discovery completed within six months after the filing of the complaint. Petitioners sought no discovery prior to that deadline. Afterwards, all parties moved for summary judgment. The District Court granted summary judgment for respondents on June 29, 1990.

Finding that the parties agreed as to the material facts, the District Court ruled that Section 58 is "content neutral,

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10 The District Court expressly found that the Town Hall polling place was "central and convenient" and had not been selected "for any improper reason." The court found that the evidence petitioners introduced to support their conspiracy theory actually established facts "quite to the contrary."

directed blindly at those who oppose any resolution adopted by the Town's duly-elected representatives" and therefore does "not discriminate against any identifiable class" or "unconstitutionally denigrate[ ] [petitioners'] voting power." The District Court found that the Town had "an obviously legitimate governmental interest in adopting referendum procedures that will prevent the rejection of a considered decision of the [legislature] by a fraction of electors too few in number adequately to present the best interests of other town residents." The District Court thus rejected the claim that Section 58 is unconstitutional, relying on this Court's opinion in *Gordon v. Lance*, 403 U.S. 1 (1971).

Concerning the claim that the referendum was conducted in a manner designed to frustrate participation, the District Court found as follows:

> Plaintiffs have not offered evidence of a single individual who was prevented from voting due to the reduced hours the polling location was open. Nor have they offered any evidence that this location was so crowded that lines formed so as to delay unreasonably any voter in his or her effort to exercise the right to vote . . . [P]laintiffs have offered no evidence that defendants' actions deprived any voter of a reasonable opportunity to vote, of reasonable access to the voting place, or to a reasonable amount of time to vote within a private and enclosed space . . . Indeed, plaintiffs have failed to offer evidence that any of defendants' actions caused potential voters to stay away at all.

A unanimous panel of the Court of Appeals for the Second Circuit affirmed on March 1, 1991. The Court of Appeals concluded that *Gordon v. Lance* "compels" judgment for respondents. The Court found that the 25% threshold served a "rational, nondiscriminatory purpose" and that it "simply accords added weight to the decision of elected officials." The Court of Appeals found that there was no

evidence whatever to support the conspiracy claim under Sections 1983 and 1986.[11]

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS OR ANY OTHER FEDERAL COURT AND DOES NOT REACH ANY NEW OR UNRESOLVED QUESTION OF LAW.

The decision below did not address or decide any novel or unresolved question of law. The ruling below does not conflict with, and indeed is in perfect harmony with, every relevant decision of this and every other federal court. Moreover, petitioners expressly disavow any desire to have this Court revisit or overrule the decision from this Court that, in the words of the Court of Appeals, "compels" judgment for respondents, *Gordon v. Lance*. Petitioners fail to explain why the opinion in *Gordon* does not directly control this case, why the facts of this case do not fall within the rationale and reasoning of *Gordon*, or why a result directly at odds with the rule of *Gordon* would be appropriate here.

In *Gordon v. Lance*, 403 U.S. 1 (1971), the Court held that provisions of West Virginia's constitution and statutes requir-

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11 The dispute between the parties is now moot, largely because petitioners failed to appeal the District Court's denial of a preliminary injunction. Petitioners no longer seek money damages from the individual respondents or an injunction against the issuance of the bonds or the purchase of the property, and instead ask only for a declaration that they won the referendum. But such a declaration would be academic because the District Court no longer has the power to award or enforce any remedy. The Town has incurred the debt and has owned the land for two years and cannot force the Prindles and Hopkins to rescind the sale. Indeed, at the hearing before the District Court on their motion for a preliminary injunction, petitioners' counsel admitted that, absent equitable relief, the transaction would not be "reversible."

ing the affirmative votes of 60% of those voting in a referendum before political subdivisions could incur bonded indebtedness did not violate the Equal Protection Clause. The Court ruled that, when all citizens are entitled to vote and no citizen's vote is weighed more heavily than another's, the Constitution does not require that a simple majority of those casting ballots always prevail. The Court held that the supermajority provisions did not discriminate against any identifiable class and therefore did not violate the Equal Protection Clause.

Significantly, the Court specifically stated that it saw no constitutional distinction between the supermajority provision at issue in that case and provisions, such as the one at issue here, requiring the affirmative votes of a minimum percentage of the entire population—even if the prescribed threshold were far higher than Darien's Section 58(e). As the Court stated: "we see no constitutional distinction between the 60% requirement in the present case and a state requirement that a given issue be *approved by a majority of all registered voters* [even though] the latter requirement would be far more burdensome." 403 U.S. at 7 n.5 (emphasis added). Inasmuch as the Court thought it beyond discussion that a 50% minimum participation requirement was inoffensive, the 25% threshold at issue here clearly did not deny petitioners equal protection of the laws. *See Clay v. Thornton*, 169 S.E.2d 617 (S.C. 1969), *appeal dismissed*, 397 U.S. 39 (1970); *Hall v. Thornton*, 445 F.2d 834 (4th Cir. 1971).

The *Gordon* Court relied on its earlier decision in *Fortson v. Secretary of State*, 385 U.S. 231 (1966), in which the Court had upheld an electoral system that permitted the runner up in a gubernatorial election to win the race. If no candidate commanded a majority in the general election, the state legislature, not the voters, chose from among the two top finishers. Therefore, a candidate could win the election without ever demonstrating greater voter support than his rival. The Court rejected a claim that the system violated the Equal Protection Clause by diluting the ballots cast for the top vote getter.

The Court's opinion in *Gordon* has been viewed as resolving, entirely and finally, the question posed by this case—whether the Constitution requires that a referendum be deemed won by whichever side received 50.1% of the vote. The Court itself interpreted *Gordon* six years later as holding that "a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class." *Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 268 n.13 (1977).[12]

During the two decades since *Gordon*, dozens of similar state constitutional provisions, statutes, and ordinances, nationwide, have been in place.[13] In addition, at least twelve

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12 *See City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (upholding city charter requiring zoning variations to be approved by 55% of referendum vote); *Lefkovits v. State Board of Elections*, 400 F. Supp. 1005 (N.D. Ill. 1975), *aff'd*, 424 U.S. 901 (1976) (upholding law requiring judge seeking retention to amass 60% of votes cast); *LoFrisco v. Schaffer*, 341 F. Supp. 743 (D. Conn.), *aff'd*, 409 U.S. 972 (1972) (upholding minority representation statute restricting number of candidates single party may nominate for multi-member board and number of candidates for whom each citizen may vote); *Brenner v. School Dist.*, 315 F. Supp. 627 (W.D. Mo. 1970), *aff'd*, 403 U.S. 913 (1971) (upholding requirement that tax levy obtain 67% approval at referendum); *Bogert v. Kinzer*, 465 P.2d 639, 647 (Idaho 1970), *appeal dismissed*, 403 U.S. 914 (1971) (two-thirds referendum majority required to incur debt); *Baker v. Regional High School Dist. No. 5*, 476 F. Supp. 319, 322-23 (D. Conn. 1979) (upholding law permitting minority of school board members to block measures supported by majority); *Whalen v. Heimann*, 373 F. Supp. 353, 358 (D. Conn. 1974) (upholding veto referendum provision identical to Darien's Charter § 58); *George Benz & Sons v. Hardin*, 342 F. Supp. 88, 91 (D. Minn. 1972) (2/3 majority required for certain referenda); *Kaelin v. Warden*, 334 F. Supp. 602, 605 (E.D. Pa. 1971) (upholding law permitting each voter to cast ballots for only two candidates running for three-member board).

13 *E.g.*, Idaho Const. art. 8, § 3 (2/3 vote); Iowa Code Ann. § 75.1 (West 1991) (60% vote); Ky. Const. § 157 (2/3 vote); Miss. Code Ann.

municipalities in Connecticut alone provide for veto referenda and require a minimum vote of all registered voters.[14]

Gordon and its progeny control this case and petitioners do not seek to disturb *Gordon*. The Petition poses no question worthy of review.

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§ 21-33-311 (1990) (3/5 vote); Miss. Code Ann. § 37-59-17 (1990) (3/5 vote); Miss. Code Ann. § 19-9-17 (1972) (3/5 vote); Mo. Const. art. 6, § 26(b) (2/3 vote); Mont. Code Ann. § 7-7-4235 (1989) (if voter turnout is more than 30% but less than 40%, proposition is approved only upon a favorable vote of at least 60% of voters; if voter turnout is 30% or less, the measure is considered rejected); N.H. Rev. Stat. Ann. § 33:8 (1988) (2/3 vote and a minimum turnout of the voters); N.M. Const. art. IV, § 1 (any law can be repealed by electorate upon presentation of petition and a majority vote to reject, provided the total votes are not less than 40% of the votes cast at the general election); N.Y. Const. art. 8, § 4(h) (60%); N.Y. Local Fin. Law § 104.00(c)(1) (McKinney 1968) (60%); N.Y. Local Fin. Law § 104(e) (McKinney 1968) (2/3 vote); N.D. Cent. Code § 21-03-07 (Supp. 1989) (60%); Okla. Const. art. 10, § 26 (3/5 vote); S.C. Const. art. VII, § 8 (incorporation of new municipalities and readjustment of boundaries are subject to consent of a majority of electors voting in election who reside in and are entitled by law to vote within the district proposed to be incorporated); S.D. Codified Laws Ann. § 9-26-1 (1981) (60%); Tenn. Const. art. 2, § 29 (3/4 vote); Tex. Const. art. 3, § 52(b) (2/3 vote); Wash. Const. art. 8, § 6 (3/5 vote); W. Va. Const. art. 10, § 7 (3/5 vote); W. Va. Const. art. 10, § 8 (3/5 vote).

14 Branford Town Charter § 8; Cromwell Town Charter § C605; East Hartford Town Charter § 8.5; Ellington Town Charter ch. VI, § 605; Enfield Town Charter ch. III, § 7; Fairfield Town Charter art. VI; Greenwich Municipal Code § 174; Killingly Town Charter § 508; Plainville Town Charter § 9; South Windsor Charter § C313; Torrington Code § C4-7; Waterford Town Charter § 3.1.14.

II.

THE COURTS BELOW CORRECTLY APPLIED WELL-SETTLED PRINCIPLES TO UNDISPUTED FACTS.

A. Section 58(e) Cannot Violate The Equal Protection Clause Because It Does Not Discriminate Against Any Identifiable Class.

Both Courts below concluded that Section 58(e) does not discriminate against any identifiable class. It is facially neutral because it makes no classifications and treats petitioners no differently than any other registered voter. All adult citizens are eligible to register to cast one vote; all votes count equally.

Of course, after the referendum, just as after any election, it is possible to identify the persons whose wishes were frustrated because of Section 58(e). But, because Section 58(e) may be invoked regardless of the subject matter of the legislation at issue, it is simply not possible to know or even guess in advance who will be helped or hurt by Section 58(e). And there is no reason to believe that those burdened by it in one referendum will not be helped by it in the next one.

As the Court put it in *Gordon*, to sustain a challenge to an election law under the Equal Protection Clause, a plaintiff must demonstrate as a threshold matter that the law creates an "independently" identifiable class, that is, a class that may be described independent of the election results. 403 U.S. at 7. *See LoFrisco v. Schaffer*, 341 F. Supp. 743, 749 (D. Conn.), *aff'd*, 409 U.S. 972 (1972) ("Dilution [of votes] is not cognizable under the Fourteenth Amendment unless [groups are discriminated against because] of some *a priori* characteristic unrelated to how they vote and to the subject matter of the election."); *Brenner v. School Dist.*, 315 F. Supp. 627, 634 (W.D. Mo. 1970), *aff'd*, 403 U.S. 913 (1971) (decisional rules for referenda do not involve an identifiable class of voters because it is unknown before the election how the electorate will vote).

Petitioners' proposed class ("opponents of the status quo") does not meet the standards set forth in *Gordon*. Indeed, a similar class could have been defined in *Gordon*: those who favor bonded indebtedness over other forms of financing. But as the Court in *Gordon* stated, there was "no *independently* identifiable group or category that favors bonded indebtedness over other forms of financing." *Gordon*, 403 U.S. at 5 (emphasis added).[15]

B. Section 58(e) Does Not Infringe Upon Any Fundamental Right.

Petitioners do not and could not claim they were disenfranchised. Instead, they argue that the minimum turnout provision diluted their votes and that therefore § 58(e) runs afoul of the one person, one vote doctrine. But a vote is not diluted simply because the state adopts a rule of decision other than the most common one: a simple majority of the votes actually cast. "[T]here is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." *Gordon*, 403 U.S. at 6. *See Fortson v. Secretary of State*, 385 U.S. 231 (1966).

Moreover, the suggestion that Section 58 frustrates majority rule is misguided. Petitioners' argument rests on the unstated assumption that the Constitution requires all non-

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15 Moreover, the uncontroverted evidence flatly refutes petitioners' arguments concerning the effect of Section 58. The veto provision has been invoked only four times in 40 years. On only two occasions did the majority of votes cast not prevail. The land purchase and bond issue were approved unanimously at public meetings by three Town Boards and by an 85% margin in the RTM. Those Town officials had just recently been elected by a high percentage of all registered voters. The Town's government features high voter participation, short terms, high turnover, nominal or no pay, a legislature with no party affiliations and a very low constituent-to-representative ratio, and mandatory minority party representation on Town Boards. And there is no evidence that Charter Section 58 was enacted for the purpose of weakening, rather than strengthening, popular control over elected officials. *Cf. James v. Valtierra*, 402 U.S. 137, 141 (1971) ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice").

participating voters to be counted either (i) not at all, (ii) as if they had all voted the same way as the majority of participating citizens voted, or (iii) as if they all divided their votes in the same proportions as did those citizens who did vote. But nothing in the Constitution prevents a state from counting the votes of registered, non-participating voters as if they had all voted with the minority of those who voted. Indeed, this is precisely what the Court ruled in *Gordon* when it referred approvingly to a statute requiring voters seeking to pass a referendum to garner the support of a majority of all voters, not merely of all votes cast. 403 U.S. at 7-8, citing with approval *Clay v. Thorton*, 169 S.E.2d 617, 620 (S.C. 1969), *appeal dismissed*, 397 U.S. 39 (1970) *See County of Cass v. Johnston*, 95 U.S. 360 (1877); *Harshman v. Bates County*, 92 U.S. 569 (1875).

C. Section 58(e) Is Rationally Related To A Legitimate State Interest.

Section 58(e) is a rational means to serve legitimate government ends. It reflects a thoughtful compromise between two commendable goals: first, retaining for the electorate ultimate control over the resolution of significant issues, even in between elections, and, second, preventing laws enacted by a majority of duly elected representatives from being overturned by a small minority of the population. Absent the minimum turnout provision of Section 58(e), a law passed unanimously by the RTM and all Town Boards could be vetoed by any number of citizens, no matter how small, who managed to organize themselves promptly and participate in a hastily scheduled, single issue special election at which turnout would surely be modest. *Whalen v. Heimann*, 373 F. Supp. 353, 358 (D. Conn. 1974) (town has "obviously legitimate governmental interest in adopting referendum procedures that will prevent the rejection of a considered decision of the Town Council by a faction of electors too few in number adequately to present the best interests of other town residents").

The nation's history confirms the wisdom of occasionally requiring a stronger consensus than a bare majority of votes cast. The Constitutions of the United States and of the various states are replete with provisions requiring either a supermajority or a minimum participation for legislative action. For example, the U.S. Constitution requires a two-thirds vote to convict an impeached official,[16] expel a member,[17] override a veto,[18] approve a treaty,[19] propose a constitutional amendment,[20] or find the President unable to discharge his duties.[21]

Moreover, a majority of members must be present for the transaction of business in either House,[22] and a two-thirds quorum is required when the Senate elects the President.[23] These quorum rules mean that, even when a simple majority of votes is sufficient to enact legislation, the affirmative votes of more than 25% of the members are always required.

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16 Article I, § 3, cl. 6.

17 Article I, § 5, cl. 2; *see also* Amendment XIV, § 3 (requiring vote of two-thirds of each House to expel members involved in the insurrection).

18 Article I, § 7, cl. 2.

19 Article II, § 2, cl. 2.

20 Article V (also requiring ratification by the legislatures or conventions of three-fourths of the states). *See Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (upholding state constitutional provision requiring 3/5 vote of each House to ratify proposed amendment to U.S. Constitution). *See also* Article VII (requiring votes of nine of thirteen original states for ratification of Constitution).

21 Amendment XXV, § 4, cl. 2.

22 Article I, § 5, cl. 1; *see United States v. Ballin*, 144 U.S. 1 (1892).

23 Amendment XII (also requiring an absolute majority of all states, regardless of how many states actually vote).

CONCLUSION

For the reasons set forth above, and in the opinions of the Court of Appeals and the District Court, respondents respectfully request that this Court enter an order denying petitioners' petition for a writ of certiorari.

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Respectfully submitted,

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